

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHWESTERN DIVISION**

TWYLA MILES )  
                  )  
Plaintiff,     )  
                  )  
vs.              )                   **CASE NO: 3:09-cv-00108-RBP**  
                  )  
WAL-MART EAST, L.P. )  
                  )  
Defendant.     )

**MEMORANDUM OPINION**

This cause comes on to be heard on the Plaintiff's Objection to Report and Recommendation (R&R) of the magistrate judge.<sup>1</sup>

After a full consideration of the evidence in the case, the court has concluded that the objection should be sustained as to the negligence claim. The objection to the wantonness claim will be overruled.

The court will not critique the R&R, but does note that there is a suggestion of credibility determinations and the weighing of evidence. The court attaches hereto pertinent excerpts from depositions.

Based on the evidence in the attached excerpts there is a reasonable inference that the plaintiff slipped on a "stream" of water which was related in some fashion to an ice machine. Further, that the "stream" could have resulted either from some malfunction of the machine or use of the machine by customers. Further, that one or more employees of the defendant who passed the area of the fall were charged with making safety inspections and failed to note the water. The excerpts may indicate further evidence of negligence.

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<sup>1</sup> The R&R was filed on September 13, 2010. The objection was filed on September 27, 2010.

The court has not attached any weight to the “expert opinion.” A *Daubert* hearing should likely be held prior to trial.

This the 8<sup>th</sup> day of December, 2010.

  
ROBERT B. PROPST  
SENIOR UNITED STATES DISTRICT JUDGE

**EXCERPTS FROM DEPOSITION OF TWYLA MILES**  
**[Emphases Added]**

Q (By defendant's attorney) You know one of their big rules as you walk around the store is be sure to monitor the floor to check for any kind of spill or debris or things like that on the floor?

A Yes, ma'am.

....

A Yes.

Q Do you remember if there was a mat in front of this ice machine?

A No.

Q When you walked by the first time?

A. No.

Q Are you saying there was none or you don't remember?

A *There was no mat.*

....

A When you walk out from the Money Center, you go out and –you go right out beside the ice machine, and I was going right out to go to the register.

....

A When I came out from the Money Center, I didn't make it to the closest register. *That's where I slid and fell.*

....

Q Two to three feet. Okay. *And from where you fell at the X to the side of the ice machine is how many feet?*

A *Like two to three feet.* What happened is when I was sliding and slipped and I fell, that just kind of disoriented me. And I don't know.

....

Q (BY MS. SYDNOR) Do you think you were two or three feet here from the ice machine when you fell?

A Yes, ma'am. I think so.

....

A I went over. There were coolers stacked up beside the machine, and I kind of just went into them and went down on the floor with my knee.

....

A *I slid. It was like I was sliding.* I don't know how to –

....

Q And you don't remember what was going on with the right foot?

A No, ma'am. It happened so fast.

....

Q Are you talking about some ice chest kind of coolers?

A Styrofoam. Yes, ma'am.

Q And they were where?

A Right up against the side of the ice machine.

....

Q Okay. And so when you fell forward, you actually landed on the styrofoam coolers?

A Yes, ma'am. I can't remember if I broke a lid from the styrofoam. I know I went into the coolers. I don't remember.

....

Q Did you at that point look down to see what might have caused you to slide?

A Yes. That is when I seen my knee had blood on it and I had – my capri was wet. I had on capris. And I was – it was like I was bruised on my knee.

Q I'm not talking about bruising. I'm talking about did you ever see any substance on the floor?

A No.

Q Ever?

A No.

....

Q *Did you not see – ever see any liquid on the floor?*

A *Not until after I fell.*

....

Q Did you see some liquid on the floor after you fell?  
A I didn't see any liquid.  
Q That's what I just asked you.  
A Okay.  
Q And you said that the only wet place you felt was on the knee of your pants on your left side?  
A Yes.

....

A Okay. When I was sitting there, remember saying that I couldn't understand why my capri was wet, and it wasn't just from blood.  
Q How did you know?  
A Because I felt of it and I didn't understand why it was wet.  
Q You said your knee was bleeding, right?  
A Yes.  
Q Was it bleeding enough blood to be wet?  
A No. It was where it was like. Like—  
Q A cut will bleed.  
A But not bad. I mean it's where I got a bandaid.

....

Q And as far as the wet place on your knee, how big a place are you talking about?  
A Maybe as big around as a quarter.  
Q Is that the only wet place you felt on your body, your clothes, your shoes, any place else?  
A Yes, ma'am.  
Q And I take it that, number one, whatever it was did not have a smell?  
A No.  
Q And is that why you're saying you think it was water?  
A Yes.  
Q And it didn't have any dark places or track marks or foot prints in it?  
A I mean it was just –  
Q You need to answer yes or no.  
A No.  
Q No, it did not?  
A No.  
Q So, as best you know, to the extend there was anything on the floor, it was an amount of water that was clear, as best you could tell?  
A Yes.  
Q That ended up once it went onto your pants the size of a quarter?  
A Yes.

....

Q What did they say?

A *I don't know names, but one of the associates came over and she was the one that found the water. She's the one that said, "Oh my gosh. There it is. Here is the water."*

Q But you're saying she said, "Oh my gosh. Here is the water," but you didn't look at or or you didn't see it?

A *Once she showed it, yes. I looked at it when she seen it.*

....

Q *Are you now saying that you did see some water after the accident?*

A *After the accident, yes, ma'am. I'm sorry. Yes, I did, after.*

Q *All right. Tell me where the water was as to where you were sitting on the floor.*

A *Approximately two to three feet.*

Q Was it ahead of you, to your left, to your right, behind you?

A Behind me when I was sitting there.

Q *And what did the water look like?*

A *Like a stream.*

Q Like maybe somebody spilled a bit of a drink or something?

A Not really like that. It was more like where it was like a drizzle. Like something was leaking, something of that sort.

....

A *It's not that good, but I mean it was where the light shined down on it. And that is how the lady found it.*

Q Okay. Well, you said you could see it from two to three feet, right?

A (Witness nodding head.) *When I was sitting down and when she showed – yes.*

....

Q (BY MS. SYDNOR) And the question is: As you sit here today, can you say whether or not you did step in this six inch stream or not before you fell?

A *Yes. I don't know what else could have caused it.*

Q Well, do you have a memory of or did you see that you stepped in it?

A There could have been no other reason why my capri was wet.

....

Q *Did you see a mark you left on the floor?*

A It was like just a little – like a skidmark.

Q *What color was it, if it was a color?*

A Black.

....

A When I was right there with them, one of the associates said something about the ice machine, that it had been worked on before. And they didn't know if someone had came to work on it that day or they were supposed to go and look and find out.

....

**EXCERPTS FROM DEPOSITION OF DIANTHIA JONES**  
**[Emphases Added]**

Q So, she left out kind of the way this thing opens up, the only way she could leave out of The Money Center?

A Yes.

Q Is that correct? Okay. Now, as she was leaving, did you see her leave The Money Center?

A No.

Q When was the last time, before you were alerted that something had happened, *where did you see her last?*

A *When I saw her, she was on the floor.*

....

Q And where exactly was she sitting in relation to the ice machine?

A About four or five feet.

Q Four or five feet. Okay. Are you sure it was four or five feet?

A Yes.

....

Q *How did you contact Nancy?*

A *She was like walking back and forth.*

Q Now, did she walk back and forth in that area in front of The Money Center?

A Yes.

....

Q And this area that we've drawn here, now you stated earlier you saw Ms. Joyner walking back and forth through that area, *this area here (indicating)? Would you say she walked through this area, particular are here (indicating)?*

A Yes.

Q *Did she walk through this area while Ms. Miles was in line?*

A Yes.

....

Q *Had Ms. Joyner, she been on duty the whole time that you were there that day?*

A Yes.

Q *So, in addition to you inspecting that area, it was also her job to walk through and inspect that area?*

A Yes.

**EXCERPTS FROM DEPOSITION OF LINETTE GAIL NICHOLS**  
**[Emphases Added]**

Q What did you observe when you arrived at the scene of the accident?

A That the lady was sitting in a chair.

Q She was sitting in a chair?

A Un-huh. (Affirmative).

Q *Where was that chair located?*

A *By the ice machine.*

Q Who put her in that chair?

A She did. The lady next door brought it to her.

....

Q *Did you ask her what happened?*

A I did.

Q *What did she say?*

A *She said that she had slipped in some water.*

Q Did she state where she believed that water to be?

A *She pointed out some water to me.*

Q Did you observe water on the floor?

A There was four spots.

Q Where were those spots located?

A I would say from the ice machine and the wall there, and I would say approximately, anywhere from four to five feet from where she was at.

Q You're saying, are you saying there were four to five feet from the ice machine?

A Uh-huh (Affirmative).

Q Or, from where she was?

A *She was right against the ice machine.*

Q You are talking about where she was sitting?

A Right. In the chair by the ice machine. I would go – if I'd taken my measurement, I'd taken it from the ice machine. It's four or five feet from there.

NOTE BY COURT: [She was already in the chair]

....

Q And did you observe these spots on the ground?

A I did.

A *There was nothing else in the water, but her toenail was laying off to the side.*

Q *Whose toenail was it?*

A *It was the lady's, Ms. Miles.*

Q Ms. Miles.

A *Because when I noticed the toenail, she told me, I stepped over the water and I stood over the water. She told me what it was, I looked down and I say her toenail. And I asked her was that her toenail.*

Q *She told you she stepped over the water?*

A *I stepped over the water. I stepped and protected the water.*

Q *Okay. You stepped over the water?*

A *So, it would be safe in that area.*

Q *You observed the toenail in the water?*

A *No.*

Q *Next to the water?*

A *It was next to the water. I would say a foot over the water.*

....

Q *Okay. How did it appear?*

A *It was – it had like a mark, and it was like blood had came to the top. Of that mark, there was about a half an inch, that was all I saw on her knee.*

Q *Had blood on top of her knee?*

A *Yes. Like, it wasn't dribbling or anything. It was just like there.*

Q *Okay.*

A *Like you'd scratched yourself.*

....

Q *How close in proximity was the toenail to the spots of water?*

A *I'd give it a foot and a half.*

Q *A foot and a half. All right.*

....

A *She told me she slipped in that water and pointed to the water. And when she did, I stepped to protect that area.*

....

Q *So, on Plaintiff's Exhibit C, we're showing – it looks, appears to be pieces of toenail and a black mark, is that accurate?*

A *That's correct.*

....

Q *(By Mr. Childers), All right. So, this mark is – how far away is the water from the black mark on the toenail?*

A *The black mark and the toenail is – oh, I'd say there's, probably –what, four or five inches, there, probably.*

....

Q So, there's – how far do you – there's two water droppings. *The closest water droplet is how close to the toenail?*

A *Okay. I'd say probably about six inches or so.*

....

Q And you're saying basically on Plaintiff's Exhibit D, bottom photo is a picture of water, roughly a foot away from the toenail?

A Yeah, I'd say a foot, afoot and a half, something like that, yeah.

....

Q (By Mr. Childers), Okay. Now what are we looking at in these photos?

A Just the floor, in general, that there was no tread marks, that the water was not disturbed, that the drops that I had observed and had photographed earlier, that there was no track marks, there was no disturbance of the water.

....

Q So, *in looking across here, we have water; a foot away, toe nail; six inches away, black mark, would you agree?*

A *Buff mark, yeah, I'd agree with that.*

Q *I'm just saying black mark, I'm not implying how the mark was created.*

....

Q Okay. *And now on this, under the incident and general information, you indicated that there was a slip on liquids, is that correct?*

A That's what – that's the option it gave me.

Q And you put that in your accident report?

A No. That's the option it gives me.

Q Okay. But that's what you selected on the options here?

A Because that's all it gave me.

Q And you indicated also on there that one of the options it gave you, you indicated there was bodily injury, did you not?

....

Q Okay. You don't know how the liquid got on the floor, do you?

A I do not.

Q And you don't know exactly how long it had been on the floor?

A I do not.